

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**IN RE:
BLUE CROSS BLUE SHIELD
ANTITRUST LITIGATION
(MDL NO. 2406)**

**Master File No. 2:13-CV-20000-RDP
This Document Relates to
Provider Track Cases**

**PROVIDER PLAINTIFFS' REPLY TO DEFENDANTS'
RESPONSE TO PROVIDERS' NOTICE OF SUPPLEMENTAL AUTHORITY
REGARDING THE PARTIES' MOTIONS FOR
PARTIAL SUMMARY JUDGMENT ON THE STANDARD OF REVIEW**

The Provider Plaintiffs write briefly to address two misconceptions and one erroneous argument in the Defendants' response to the Providers' notice of supplemental authority (Doc. No. 2923).

In response to the Defendants' first and second points, the Providers do not propose that this Court need not determine the standard of review applicable to the Blues' service areas. Instead, the Providers recognize, as the court did in *PLS.com*, that the standard of review is a legal decision based on determinations of fact. If genuine factual disputes exist, they must be resolved before the standard of review can be determined. This can happen as late as trial. *See* Doc. No. 2747 at 9.

In response to the Defendants' third point, the Providers' acknowledgment that discovery will be supplemented before trial does not support applying the rule of reason. As the Defendants themselves assert, the standard of review focuses on the nature of the restrictions themselves, not their particular market context. Doc. No. 2923 at 1–2. After the close of discovery, the Blues purported to change the nature of the restrictions themselves, and it is on that issue—not the particular market context—that further discovery would be required before the Blues could hope to obtain summary judgment on the standard of review for exclusive service areas.

Finally, in response to the Defendants' fourth point, it is flatly incorrect that the Providers "never defined the relevant market." Doc. No. 2923 at 3. The Providers explained why a full market definition is unnecessary for their group boycott claim, but went a step further and explicitly defined the market as the "market for the purchase of healthcare services that is limited to commercial patients." Doc. No. 2729 at 10. The Defendants' real argument is not that the market is undefined, but that the parties dispute whether the market is two-sided. Doc. No. 2923 at 3. But that argument is based on *American Express*, Doc. No. 2756 at 24 ("Providers have committed the same fatal mistake as plaintiffs in *Ohio v. American Express*"), and the Defendants have conceded that *American Express* does not affect the standard of review, Doc. No. 2752 at 12.

Dated: June 6, 2022

Respectfully submitted,

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